U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Date: MAY 3 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Permanent Residence Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255.

IN BEHALF OF APPLICANT: [redacted]

Public Copy
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center, who certified his decision for review by the Associate Commissioner, Examinations. The director's decision will be affirmed.

The applicant is a native and citizen of South Korea who filed this application for adjustment of status to that of a lawful permanent resident under section 245 of the Immigration and Nationality Act (the Act). At the time of filing, approximately four months prior to the applicant's twenty-first birthday, the applicant was the child of the beneficiary of an approved immigrant petition. Accordingly, the applicant was entitled at the time of filing to the same immigrant status as his parent, pursuant to section 203(d) of the Act. While the application was pending, the applicant turned twenty-one years old.

As the applicant had turned twenty-one years old, the director denied the application, noting that the applicant no longer met the definition of "child" under section 101(b)(1) of the Act. Section 101(b)(1) defines a "child" to be an unmarried person under the age of twenty-one.

In response, counsel for the applicant filed an appeal challenging the denial of the application.[1] On the Form I-290B Notice of Appeal, counsel states that the applicant has "aged out" and will not be able to adjust status with her family, due to "bureaucracy nonfeasance, or malfeasance, denying them the unification of family, which our immigration laws are supposed to espouse." Counsel did not cite any law or regulation in support of his assertion. No other evidence or argument was submitted in support of the appeal.

Counsel's argument is not persuasive. An applicant "must be eligible, at the time [the adjustment] application is acted on, for the preference category relied on when the application was filed." Matter of Hernandez-Puente, 20 I&N Dec. 335, 337 (BIA 1991). In reviewing the rescission of a retroactive approval of adjustment of status, the Board of Immigration Appeals determined that the Service has no authority to grant an application for adjustment of status on a retroactive or nunc pro tunc basis. Id.

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[1] No appeal lies from the denial of an application for adjustment of status under section 245 of the Act. 8 CFR 245.2(a)(5)(ii). For this reason, the applicant's appeal should be rejected. However, as the director certified his decision pursuant to 8 CFR 103.4, the applicant's appeal will be considered and the director's decision will be reviewed.

Since the applicant was no longer a "child" at the time the director acted on the application to adjust status, the applicant was not eligible to derive immigrant status from his parent. As established in Service precedent, the director does not have the authority to retroactively grant an application for adjustment of status where the applicant is not eligible at the time the decision is made. As in Matter of Hernandez-Puente, such a nunc pro tunc adjustment of status would be subject to rescission proceedings under section 246 of the Act.

Accordingly, the director properly denied the application to adjust status. The decision of the director to deny the application will be affirmed.

It is noted that the applicant's parent is not precluded from filing an immigrant petition for the applicant as the unmarried daughter of a permanent resident, pursuant to section 203(a)(2) of the Act, once the parent has adjusted status.

ORDER: The director's decision is affirmed.